

April 24. 1767.

A N S W E R S

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Thomas Trotter of Mortonhall, Esq; and William Mitchel tenant in Swanston,

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The PETITION of Andrew Finnie late tenant in Swanston.

THE lands of Swanston were in the natural possession of the proprietor Mr Trotter of Mortonhall before the 1710, when they were let in tack to James Finnie, the petitioner's father. As Mortonhall cannot be supposed to have carried off the dung he had upon the lands at Finnie's entry, and as it is probable he likewise left him the straw of the preceding crop; so this possession became a steelbow-farm; and has continued such down to this day, so far as respects the straw, the tenant being obliged to consume the same upon the ground, and at his removal to leave the straw of the preceding crop, so far as unconsumed, for the use of his successor in the farm.

In the year 1728, Finnie's tack having expired, he obtained a new tack of the said farm from the late Henry Trotter of Mortonhall, the respondent's brother, for twenty-one years; by which, among other prestations, Finnie became bound "to duly labour and manure the said lands;—and further, "to leave the *steelbow* straw that shall grow upon the ground

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“ of the said lands the last year of the tack ;—— and likewise
 “ to lay a kiln of lime upon the lands during the last three
 “ years of the tack ;” besides being obliged to pay a rent of
 2000 merks, and to leave the houses in repair, &c.

James Finnie the tacksman died during the currency of this last tack ; and was succeeded by the petitioner his son ; who held the possession during the remainder of the lease, and after its expiry in the 1748, by tacit relocation, down to Martinmas 1764 ; when he removed, and was succeeded by the other respondent William Mitchel.

As this farm was under no lease at the time of the present Mortonhall's succession to his brother, he was inclined to have preferred the petitioner to the tack, rather than any other. Accordingly Mortonhall offered him the same on reasonable terms, which the petitioner once and again accepted of, and as often refused from. Mortonhall thus finding there was no fixing him, was at length obliged to let the farm to William Mitchel.

When the petitioner came to remove, he, in many respects failed to make good the obligations of his former tack. In particular, he left the houses in a most ruinous condition, which has since put Mortonhall to a considerable expence. He carried off some part of the steelbow-straw ; and as to the management of the farm, instead of improving it towards the close of his possession, or even continuing to labour it as he had done in former times, while he had the prospect of sitting, he, during the last three years of his possession, totally altered his method, and did what he could to scourge and run out the ground, to the great prejudice of his master, and of the succeeding tenant.

As this farm lies immediately on the back or north side of Pentlandhills, the petitioner and his predecessors had thought it improper to sow almost any wheat in it, and were in use to apply their dung for raising other grains, and particularly for manuring their pease and bear land. But during these
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three last years of his possession, Mr Finnie turned a great part of his ground into wheat, and laid the far greater part of his dung upon it; and even sowed wheat upon a part of the ground for his last crop, which was neither then dunged nor the year before. But not contented with this undue advantage, he thought of still making more profit during the last year, by keeping up and selling the dung which he ought to have laid upon the land. With this view he even kept up a part of the dung which he had at the time of sowing the wheat-seed for the crop 1764, and in order to consume his straw and fodder, and increase his dunghill, he, during the following winter, kept a great number of cattle; and thus before Whitsunday 1764, he had collected a midding or dung-hill which has been since valued at L. 30 Sterling. Not one grain of this dung did he lay upon the bear-seed made about Whitsunday 1764, but raised and reaped a crop of bear on grounds upon which he had laid no dung; a thing altogether unprecedented, when a farmer has any dung to bestow upon such ground. What dung was made after the bear-seed he kept in a separate midding, where it still remains unused; and was inconsiderable, compared with the former, as the horses and cattle were mostly out in the summer-season. Yet so little attentive to the truth has Mr Finnie been in this cause, that in his representation to the Ordinary, he has these words, "As most of the middingstead was made *after* bear-seed time, the year the representer removed from Swanston, he therefore is very little hurt by this interlocutor."

As the present Mortonhall had but newly succeeded to the estate in the 1764, and was but little acquainted with the rules and practice of farmers in this matter, the petitioner thought to have got him to consent to his selling the dung that had been thus collected before the bear-seed time, as well as what had been made after it. But in this he was mistaken, as Mortonhall refused to permit it, though desirous, if possible, of avoiding any plea with this petitioner. However, as the
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matter could not be immediately settled, and it was necessary that the incoming tenant should be at liberty to use the dung, Mortonhall agreed to the having it valued in the mean time by persons mutually chosen, reserving entire to after discussion the mutual claims of the parties. Accordingly he wrote a line to that purpose, directed to his gardener, which he delivered to the petitioner; but which the petitioner thought fit to keep up, not only in the process before the sheriff, but even since its dependence in this court.

Two valuers being named, the one of them valued the great midding in question, being that made before bear-feed time, at L. 28, and the other valued it only at L. 23. This difference made it necessary for them to call in another tenant, Thomas Scot, as oversman; who instead of acceding to any of the valuations, or striking a medium between them, was so much a friend to the petitioner, that he exceeded even the highest, and so fixed the value at no less than L. 30 Sterling.

Mortonhall and the incoming tenant being upon inquiry thoroughly satisfied that the petitioner had no manner of right to this dung made before bear-feed time, and which had been unduly kept off the lands, the petitioner thought fit to bring an action against Mr Mitchel his successor, before the sheriff, libelling, "That Mitchel agreed to purchase the midding from him, and submitted the price thereof to certain valuers, who declared it worth L. 30 Sterling; and that Mitchel accordingly made use of the midding, and promised to pay the price at Martinmas 1764." Further, he alledged, that he had left in the houses some hecks, mangers, and nolt-stakes, which he had a right to carry off; and therefore concluded for payment of the L. 30, with interest since Martinmas 1764, and of L. 1 as the value of the hecks, &c.

Mr Mitchel compeared, and required production of the petitioner's tack, as regulating the manner of his leaving the possession; but which at first the petitioner declined to exhibit. Further, Mitchel contended, That the petitioner had
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right to no more than the value of what dung he made on the lands after bear-seed 1764, which would only amount to a trifle: That the hecks, &c. were fixed work, to which the petitioner had no right; and that at any rate he was intitled to compensation for the value of straw which the petitioner had carried off from the farm, and some other articles of damage done by him to the houses, &c.

The sheriff having allowed both parties a conjunct proof, sundry witnesses were examined, both as to what passed at the valuation of the dung, and as to the practice of the country in such cases, as well as to the other disputed articles of the straw, hecks, &c. Upon advising this proof, the sheriff “found it proven, *that the defender bought the dung mentioned in the libel at L. 30 Sterling*; found the other article of the libel not proven; found the defender’s compensation also not proven; and therefore found the defender liable to the pursuer in the said L. 30 Sterling, and decerned.” And upon advising a reclaiming petition, and answers, the sheriff, “in respect there is sufficient proof that the pursuer unwarrantably intromitted with some of the steelbow-straw, found that the defender must have deduction from the L. 30 Sterling found due by him by the last interlocutor of 20 s. Sterling; and adhered to the said interlocutor as to the other points.”

The respondent Mr Mitchel having obtained a suspension of this decret, which came to be discussed before Lord Stonefield, and where compearance was made for Mr Trotter of Mortonhall in support of the reasons of suspension, the Lord Ordinary, on the 21st January last, “turned the decret charged on into a libel, and *found the pursuer intitled only to the value of the dung made after bear-seed, the year he removed from the lands.*” And to this interlocutor his Lordship afterwards adhered, upon advising a representation and answers.

Mr Finnie has now reclaimed; but it is hoped your Lord-

ships will have no difficulty in refusing his petition, for the following reasons.

1mo, The petitioner stood expressly bound, by his tack, to labour and manure the lands *duly*, and even to lay a kilnful of lime upon them during the last three years of his possession. It was utterly inconsistent with that obligation to make his whole bear-feed of last crop without any dung whatever, as it is notorious that those who labour their grounds *duly*, do always lay dung upon the lands which they sow with barley, when they are possessed of it, and do even save and keep dung for that purpose. Neither can it be doubted, that had the petitioner been to continue in the farm, he would have applied the dung in question to the manuring of the bear-land of which he reaped the crop. Hence it follows, that what dung the petitioner did thus unduly keep off and with-hold from the ground laboured by him, must belong to the heritor or succeeding tenant, for the purpose of repairing the wrong he had thus committed.

2do, Had the tack contained no such obligation, it would have been implied in the nature of the thing, that the petitioner should labour and manage the farm during the last year, in the same way as another prudent farmer would do, or as he himself would have done had he been to continue in the possession. The with-holding the dung from the bear-land, with a view of selling it, was therefore highly culpable, both as it was contrary to the proper management for producing the best crop, and as the want of it tended to scourge and run out the land, which ought to have been in good condition after the bear-crop reaped by the petitioner. The dung therefore fell to be considered in the same light as if it had been actually applied in the way it ought to have been; and as in that case the petitioner could have had no claim for any price or value, so neither could he be intitled to such when the dung was unduly with-held and kept up in a midding. The least reparation that became then justly due by him,

him, was the leaving the dung for the use of the heritor or succeeding tenant in the following year.

And, 3^{tio}, Whatever might be the case in other farms, which are not *steelbow*; yet as this is a *steelbow*-farm so far as respects the straw, it evidently follows, that this dung could not be carried off in consistency with the obligation thence arising. If a tenant is bound to consume the whole straw upon the ground, and of consequence to leave the straw of his last crop to the succeeding tenant, it must be implied, that he can carry off no part of the dung that is produced by the fodder thus appropriated to the farm. It is impossible to give any other meaning to the straw being *steelbow*; for if the tenant may sell or dispose of the dung, no advantage can accrue to the farm from preventing the sale of the straw. In this case too, the petitioner thought fit to keep an extraordinary number of cattle during the last year for consuming his fodder; and the dung being proportionably increased, ought either to be laid upon the lands by him or his successor.

The petitioner indeed says, That this argument would go the length of depriving him of any consideration even for the dung made *after* the bear-feed. And the respondents apprehend that it might justly do so: but the Lord Ordinary having found the petitioner intitled to what was made *after* the bear-feed, the respondents have acquiesced therein, as Mortonhall has even inclined to depart from his right, where-ever it seems attended with any colour of hardship; although there being here the greatest reason to believe, that Finnie's father, who succeeded the heritor in the natural possession of the lands, got the whole dung, as well as the straw, at his entry, the petitioner could have had no cause to complain, if the like rule was observed at his removal. But with respect to the dung made *before* the bear-feed, which is here the sole subject of dispute, the hardship would be altogether on the other side, were the petitioner to be allowed to keep

Objection I.

Answer.

keep up and collect the whole of this dung, and then, instead of laying it upon the lands of which he was to have the crop, either to carry it off, or compel the heritor or incoming tenant to pay for it, when he himself might have had the benefit of the first crop thereby produced; and when, by with-holding it, the farm is greatly deteriorated and abused.

Obj. II. *2do*, The petitioner has objected, That it had been his practice, as well as that of other farmers in the neighbourhood, to lay the whole dung made through the year upon their wheat-land, and none at all upon the bear-land, except what they get from their cottars, who, in consideration of it, have the crop for that year: That he accordingly laid the whole of his dung made from November 1762 upon his wheat-land, sown in November 1763; and that therefore the dung he made after November 1763 was not laid upon the bear-land in spring 1764, because it never had been his practice, or that of any neighbouring farmer; and that if it were the practice of others, he could not be obliged to follow it, or to labour better the last year than former years.

Anf. But to this it is answered, That the petitioner grossly misrepresents both his own practice and that of his neighbouring farmers. Had the petitioner made this averment before the sheriff, the contrary would have been directly proved; but he has only thought fit to make it now, when the Lord Ordinary's judgement stands against him. It is indeed true, as already observed, that during the two or three last years of his possession, the petitioner turned a great part of the farm into wheat, although it was not fit for it, and thereby run out the land: but this was a total deviation from his former management, and is a just cause of complaint against him, as his former practice was to dung both his pease and bear-land. Supposing then that he truly laid his whole dung, during these last years, upon his wheat-land, it could afford no rule
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for deciding this question: and the respondents could prove, were it necessary, that for many years before the petitioner expected to remove, he was in the constant use of dunging his bear land in the best manner; and that it is the practice of other farmers in his neighbourhood so to do. It is indeed of itself an incredible assertion, that he or any other farmer should be in use to make bear-seed without dung; or that they should give their whole crop of bear to their cotters, when, in this as well as in many other farms, the bear is often, if not commonly, the most material part of the crop. Neither has the petitioner ventured to alledge that he gave his whole bear of this crop 1764 to his cotters, however inconsiderable he thought fit to make it, by throwing an excessive quantity of his ground into wheat. Besides, the respondents are now well informed, (though it is not in proof), that part of this dung was actually made before the wheat-seed time in November 1763, and so was with-held from the wheat as well as from the bear-land.

3thio, The petitioner has alledged, That according to the practice in this part of the country, the outgoing tenant has been allowed payment for his dung, even although made *before* bear-seed time; but he pretends that the proof on that point was not properly attended to by his procurator before the sheriff; and adds, that the dung made before and after Whitsunday 1764 were not separated, but lay in one heap at the time of the valuation, which was about Midsummer; and that it was only the dung made after the valuation which was kept separate; so that the midding in question contained some dung made after the bear-seed.

Obj. III.

The answer to this objection will, it is hoped, be likewise satisfactory. The respondents are well informed, that none of the gentlemen in that neighbourhood, or their incoming tenants, did ever pay for dung made *before* the bear-seed; and that the only question has been, Whether the incoming tenant was not likewise intitled to the dung made *after* the

Ans.

bear-feed without payment? which is a point not yet thoroughly settled. The question concerning the practice was, however, the subject of proof before the sheriff; and the respondents apprehend, that sufficient evidence was then brought to supersede the necessity of any further proof; and that the petitioner's accusation of his procurator is altogether affected. It is indeed true, that William Richardson's oath, as taken down, does bear, "That at his removing from a farm in East Lothian, he got payment of what dung he had, which was made *before* the bear-feed time." But as this witness is perfectly singular, the respondents imagine some mistake has been committed in taking down his oath; and, at any rate, as he is single, and speaks to a farm in East Lothian, and not to one in Mid Lothian, it is apprehended his evidence can have no weight; especially when he is expressly opposed by other witnesses. For the petitioner has omitted to inform your Lordships, that David Cunninghame at Redheugh, aged seventy-five, who has been many years a tenant in this county, and possessed two steelbow-farms, expressly depones, "That the outgoing tenant, in such a farm, was only intitled to payment for what dung was made *after the bear-feed time*." And George Robertson in Commiston, who was one of the valuers, goes still further, when speaking of steelbow-farms, and depones, "That the incoming tenant got any dung that was made *after the bear-feed time*;" which does *a fortiori* prove, that the incoming tenant got the dung made *before* the bear-feed time likewise, in case the same was not applied by the outgoing tenant in manuring the bear-land.

Thus there is here already a sufficient proof, that by the practice of steelbow-farms, the outgoing tenant has no pretensions to any payment for the dung made *before* the bear-feed time: and as to the midding in question having included some dung made *after* the bear-feed time, it is surprising that the petitioner should alledge it, while his own servant, Thomas Inglis, depones, "That he ordered the dung that
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“ was made before the Whitsunday to be separated from the
 “ dung that was made after the Whitsunday, which was ac-
 “ cordingly done, and it still remains separate.” There
 is no reason to suppose that Inglis was, or could be
 mistaken in this fact. And at any rate the interlocutor
 is general, and only over-rules the petitioner’s claim to the
 value of the dung made *before* the bear-feed time; so that if
 he could still prove, that part of the midding, valued at
 the L. 30, was actually made after that period, he might
 yet be intitled to a proportional allowance. But as the va-
 luation was made at Midsummer, little dung could be made
 from the bear-feed time to the valuation.

The *fourth* and last objection made by the petitioner is, Obj. IV.
 That there is here evidence of a bargain of sale actually con-
 cluded between him and the respondent Mitchel, by which
 the latter was to pay him the value put upon the dung. This is
 said to be proved by the oath of Thomas Scot the oversman in
 the valuation, and by the real evidence arising from that
 valuation.

But is answered to this, *first*, That Scot is a single witness; Ans.
 and who, from his conduct in valuing the dung at L. 30, ap-
 pears to have been not a little inclined to favour the peti-
 tioner. He, too, only depones to his having been desired to
 view the dung “ which had been sold by the pursuer to the
 “ defender;” and adds, That after the valuation some of the
 company proposed, that Mitchel should give a bill to Finnie
 for the value; “ which he refused, saying, he would pay it
 “ when it was taken away.” Here your Lordships will ob-
 serve, that Scot, in the first part of his oath, only speaks of
 the bargain *narrative*, without mentioning who told him of
 the dung having been sold, or assigning any cause of know-
 ledge of the bargain. And as to the alledged proposal of
 Mitchel’s giving a bill, Scot himself acknowledges, that he
 refused to do it; and although it appears that other persons
 were present on that occasion, particularly George Robertson,
 one of the first valuers, yet neither Robertson nor any other
 witness

witness whatever, does in the least support Scot's evidence, or say a single word of any sale, or proposal of granting a bill for the value.

2do, So far is Scot's evidence from being supported from the circumstance of the valuation having been made, that, as your Lordships have already heard, the valuation proceeded on a quite different medium, having been directed by Mortonhall as an expedient for allowing the incoming tenant to use the dung immediately, without prejudice to the after discussion of the question as to the property of it. This the petitioner well knew, and would have appeared from Mortonhall's letter in his own hands. He was therefore *in pessima fide* to libel, and attempt to prove, before the sheriff, a bargain of sale, which he must have been conscious did never exist; and yet, upon this sole ground did he pursue Mr Mitchel; and by the evidence of Scot alone, respecting that pretended bargain, he obtained the sheriff's decret, now suspended, and turned into libel.

Lastly, Were this pretended bargain between Mitchel and Finnie proved, as it is not, it could afford no relevant ground for intitling the petitioner to recover the price from Mitchel. Had he actually prevailed with Mitchel to conclude a bargain with him for the purchase of the dung; yet, when it afterwards appeared that the petitioner had no right to sell it, but that it truly belonged to the heritor, or to the farm, Mitchel must have been unquestionably intitled to be restored against such a bargain; and as he has here the consent and concurrence of Mortonhall to his holding the dung under a much better title than any purchase from an outgoing tenant, the petitioner has in no view any title to compel him to pay a price for it.

In respect whereof, &c.

DAV. RAE.

